IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 30, 2001 Session

LOUISIANA SAFETY SYSTEMS, INC., v. TENGASCO, INC., ET AL.

Appeal from the Circuit Court for Knox County
No. 3-249-97 Wheeler A. Rosenbalm, Judge

FILED SEPTEMBER 21, 2001

No. E2000-03021-COA-R3-CV

The primary question in this appeal is did the Trial Court err in refusing to vacate an arbitration award determining the respective liabilities between the two defendants. Defendant and third party Plaintiff Tengasco, Inc. ("Tengasco") argues that the award should be vacated because there was no arbitration agreement in effect. Pursuant to Tenn. Code Ann. § 29-5-313(a)(5), we conclude that because these issues were submitted to arbitration with no objection being made to the Trial Court or to the arbitrator that there was no arbitration agreement in effect at the relevant time, the arbitration award cannot be attacked on that basis. The decision of the Trial Court is, therefore, affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded.

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

John P. Valliant, Jr., and Paul Hensley, Knoxville, Tennessee, for the Appellant Tengasco, Inc.

James S. MacDonald, Knoxville, Tennessee, for the Appellee Louisiana Safety Systems, Inc.

W. Tyler Chastain, Knoxville, Tennessee, for the Appellee Torch, Inc.

OPINION

Background

In 1997, Louisiana Safety Systems, Inc., ("LSS") sued Tengasco and Ted Scallan ("Scallan"). LSS sells drilling equipment and supplies. LSS alleged in the complaint that it provided equipment and supplies to Tengasco in the amount of $24,350.74, exclusive of carrying charges and attorneys fees, pursuant to a credit agreement personally guaranteed by Scallan. LSS sought damages of $24,350.74, plus attorney fees and costs. Tengasco essentially denied any liability, asserting that Scallan no longer worked for Tengasco and further alleging that another company, Torch, Inc. ("Torch"), was the entity who solicited the purchase of the products. Tengasco also claimed that it was unfamiliar with the items allegedly sold to it, had no knowledge that they were ordered, and never received the products.

Tengasco filed a third party complaint against Torch. Tengasco admitted it had entered into a contractual agreement ("Agreement") with Torch whereby Torch was to act as the construction manager on the Swancreek Pipeline Project ("Project"). Pursuant to that Agreement, Torch was to receive bids and make recommendations to Tengasco for the award of contracts. Tengasco claimed that Torch was not authorized to enter into contracts on behalf of Tengasco without express written approval and consent. Tengasco averred that it neither had entered into any contract nor received any bid from LSS. Tengasco claimed that should LSS be able to prove the existence of a contract or any amount due under a contract, then that contract was made by Torch without Tengasco's consent and, therefore, Torch would be liable for any amount owing. LSS then amended its complaint to add Torch as a defendant. Torch's answer denied any liability and claimed that Tengasco had waived any contractual requirement for express written approval of purchases from LSS "as is standard in the oil and gas industry." Torch further claimed that Tengasco accepted work and products from LSS on the Project, until Tengasco elected to default on the current obligation. Torch filed a cross-claim against Tengasco in the amount of $20,315.82 for services provided on the Project which were unrelated to LSS's original claim and which remained unpaid.

Torch filed a motion to dismiss or, in the alternative, to stay all of the proceedings. In this motion, Torch claimed the Agreement between it and Tengasco contained a mandatory arbitration clause. According to Torch, the issues between these two parties which were being litigated should be resolved by arbitration, which also would resolve the issue as to which entity could have potential liability to LSS.[1]

The arbitration clause contained within the Agreement between Tengasco and Torch provides as follows:

---

[1] In this motion, Torch does not indicate whether it is seeking arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 2, or the Tennessee Uniform Arbitration Act, T.C.A. § 29-5-301, et seq. In the motion to confirm the decision of the arbitrator discussed, *infra*, only the Tennessee Uniform Arbitration Act is mentioned.

Article 8: Arbitration

8.1 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.

* * * *

8.4 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Prior to the arbitration, Tengasco never asserted to the Trial Court that there was no arbitration agreement in effect. Likewise, this argument was never advanced to the arbitrator. Quite the contrary, from the record it appears that all issues between Tengasco and Torch were voluntarily submitted to the arbitrator during the three day hearing. In fact, Tengasco requested, among other things, the following specific relief from the arbitrator:

A. [F]ind that Torch breached its contract with Tengasco by [o]rdering equipment and/or supplies from Louisiana Safety Systems, Inc. without Tengasco's approval and consent.

B. [R]equire Torch, Inc. to defend, indemnify and hold harmless Tengasco from the claims by Louisiana Safety Systems in that certain matter entitled Louisiana Safety Systems, Inc. vs. Tengasco, Inc. et al, case number 3-249-97, Circuit Court for Knox County, Tennessee.

C. [F]ind that to the extent Louisiana Safety Systems is awarded monetary relief against Tengasco in connection with this Project, that Torch be obligated to indemnify Tengasco for any amounts Tengasco may be found liable, plus interest, costs and attorney fees.

According to Tengasco's arbitration brief, one of the issues to be decided by the arbitrator was "[w]hether Torch, Inc. breached its contract with Tengasco, Inc. by [o]rdering equipment and/or supplies from Louisiana Safety Systems, Inc. without Tengasco's approval and consent; and which company should be responsible to Louisiana Safety Systems for the cost of the equipment and/or supplies". Tengasco also raised issues regarding Torch's claim and the amount Torch claimed was owed to it for work performed on the Project. Torch requested similar relief from

the arbitrator, including a finding that it was authorized by Tengasco to order the products from LSS and that Tengasco was therefore liable for same. Not only were these issues fully submitted to the arbitrator over a three day period, each party also furnished memorandums in support of their respective positions.

After the issues between Tengasco and Torch were fully arbitrated, the arbitrator issued a written award which provides, in relevant part, as follows:

> I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties [Torch, Inc., and Tengasco, Inc.], and having been duly sworn and having duly heard the proofs and allegations of the parties, FIND as follows:
>
> Torch, Inc. did not breach the contract with Tengasco, Inc. Torch, Inc. acted within the scope of its authority with respect to matters involving Louisiana Safety Systems, Inc. (LSS) and is not responsible to Tengasco, Inc. to satisfy claims by LSS in connection with the project at issue.
>
> Therefore, I award as follows:
>
> On the claim for the outstanding invoice amount, Tengasco, Inc. shall pay to Torch, Inc. the sum of Twenty Thousand Three Hundred Fifteen Dollars and Eight-Two Cents ($20,315.82) within fifteen (15) days from the date of this Award.
>
> * * * *
>
> The counterclaim [of Tengasco] is hereby denied in its entirety.
>
> Each party shall pay their own attorney fees.
>
> Tengasco, Inc. is required to defend, indemnify and hold harmless Torch, Inc. from claims made by LSS in that certain matter entitled "Louisiana Safety Systems, Inc. v. Tengasco, Inc., et al" case no 3-249-97, Circuit Court, Knox County, Tennessee.
>
> If LSS is awarded monetary relief against Torch, Inc. in connection with this project, Tengasco, Inc. is obligated to indemnify Torch, Inc. for any amounts Torch, Inc. may be found liable, plus interest, costs and reasonable attorney's fees.

* * * *

> This Award is in full settlement of all claims and counterclaims submitted in this arbitration.

Shortly after the award was issued, Torch filed a motion to confirm the decision of the arbitrator pursuant to Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-312. Tengasco then filed a motion to vacate the arbitration award. Tengasco claimed the arbitrator exceeded his authority and, pursuant to Tenn. Code Ann. § 29-5-313(3), the award should be vacated. The basis for Tengasco's motion was that the Agreement which included the arbitration clause was in effect only until August 31, 1996, and, therefore, any causes of action accruing after that date were not subject to the arbitration clause. In other words, Tengasco argued there was no arbitration agreement in force at the relevant time and the arbitrator exceeded his powers because, in effect, he had none. According to Tengasco, all of the claims which were arbitrated and which involved the purchase from LSS occurred after the Agreement expired. Tengasco also claimed that a portion of the claim made by Torch for services it performed likewise occurred after the Agreement expired.

The Trial Court initially determined that Torch's motion to confirm the award and Tengasco's motion to vacate the award both should be denied. The Trial Court concluded that if the parties voluntarily submitted the issues to arbitration, then the award should be and would be confirmed. Likewise, the Trial Court ruled that if the arbitrator ruled on any issues not actually submitted by the parties, then to that extent the award should be vacated. The Trial Court stated that it would rule on this matter when the case was heard for trial. Approximately six weeks later, a hearing was held on this matter and the Trial Court issued an order confirming the arbitration award and overruling Tengasco's motion to vacate the award.

After a trial, the Trial Court issued a memorandum opinion and entered judgment on the issues not determined in the arbitration award. Since LSS was not a party to the arbitration, the Trial Court ruled on the claims of LSS against Tengasco and Scallan, as well as the claim of LSS against Torch. In its memorandum opinion, the Trial Court ruled that at all times material to the events in this case, Torch was authorized to purchase the products at issue from LSS on behalf of Tengasco. Torch was further authorized to direct the location to which these products were to be delivered. The Trial Court found that LSS had delivered the products as instructed by Torch. Accordingly, the Trial Court ruled that LSS was entitled to recover from Tengasco the amount of $24,350.74, plus interest and attorney fees as provided in the credit agreement pursuant to which these items were delivered.[2] The Trial Court also held that since Torch was acting on behalf of a disclosed principal (i.e., Tengasco), LSS was not entitled to maintain an action against Torch, and any costs associated with that part of the litigation between LSS and Torch should be taxed against LSS. The remaining costs were taxed to Tengasco.

---

[2] Pursuant to the credit agreement, the Trial Court also held Ted Scallan personally and jointly liable with Tengasco for the entire amount of the judgment. Mr. Scallan did not appeal this judgment.

Discussion

On appeal, Tengasco raises two issues. The first is a challenge to the arbitrator's award on the basis that the arbitrator exceeded his authority because there was no arbitration agreement in effect at the relevant time. The second issue is a claim that the Trial Court erred in finding that payment was due for the products "which were ordered by Torch from Louisiana Safety Systems when the proof was uncontraverted (sic) that Tengasco did not pay for equipment until it was properly received and inspected at the project site." LSS appeals the Trial Court's assessing of court costs against it pertaining to its claim against Torch which was dismissed.

Our standard of review with regard to matters decided by the Trial Court outside the arbitration case is well settled. A review of findings of fact by the Trial Court is *de novo* upon the record of the Trial Court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

The standard of review for an arbitration award was recently discussed by our Supreme Court in *D & E Construction Company, Inc. v. Robert J. Denley Co., Inc.*, 38 S.W.3d 513 (Tenn. 2001). There, the Court stated:

> Tennessee has adopted the Uniform Arbitration Act, *see* Tenn. Code Ann. §§ 29-5-301 to -320 (2000), which governs "the scope of judicial review of arbitration awards." *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 447- 48 (Tenn. 1996). The trial court's role in reviewing the decision of arbitrators is limited to those statutory provisions that establish the grounds to modify or vacate an arbitration award. *Id.* at 448. Upon application of a party to the arbitration to confirm the award, Tennessee Code Annotated section 29-5-312 requires the trial court to "confirm [the] award, unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award...." The arbitration award may be vacated if, among other reasons, "the arbitrators exceeded their powers." Tenn. Code Ann. § 29-5-313(a)(3). In the alternative, a trial court can modify or correct the award when "[t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted." Tenn. Code Ann. § 29-5-314. In all cases warranting judicial review of arbitration awards, the trial court "must accord deference to the arbitrators' awards." *Arnold*, 914 S.W.2d at 448.

> This Court is also required to apply a deferential standard of review. *See id.* at 450. In *Arnold*, we held that when an appellate court reviews a trial court's decision in an arbitration case, "it should review findings of fact under a 'clearly erroneous' standard, [that is,] accept those facts as found unless clearly erroneous." *Id.* Moreover, we are "not permitted to consider the merits of an arbitration award even if the parties allege that the award rests on errors of fact or misrepresentation of the contract." *Id.* Where, as here, the issues presented are questions of law, we must resolve the matter "with the utmost caution, and in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." *Id.*

D & E Construction Co. Inc., 38 S.W.3d at 518.

Tengasco's argument that the arbitrator exceeded his authority is resolved by reference to the applicable statute. Tenn. Code Ann § 29-5-313(a) sets forth the various grounds upon which an arbitration award can be set aside. One of the grounds, as pointed out by Tengasco, is that the arbitrator exceeded his authority. Tenn. Code Ann. § 29-5-313(a)(3). As set forth above, Tengasco argues that the only reason the arbitrator "exceeded his authority" is because he had no authority since there was no arbitration agreement in effect at the time the vast majority of events giving rise to LSS's and Torch's claims occurred. If we accept Tengasco's position that there was no arbitration agreement in effect, Tenn. Code Ann. § 29-5-313(a)(5) is the relevant subsection, as opposed to subsection (a)(3) relied upon by Tengasco. Tenn. Code Ann. § 29-5-313(a)(5) provides that, upon application of a party, a court shall vacate an award where:

> There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 *and* the party did not participate in the arbitration hearing without raising the objection. (emphasis added).

Tenn. Code Ann § 29-5-303(a) provides that:

> On application of a party showing an agreement described in § 29-5-302, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

According to § 29-5-313(a)(5), a party who claims there was no arbitration agreement can succeed in having the arbitration award vacated on this basis if: (1) there was no arbitration

agreement and no judicial determination pursuant to § 29-5-303 that an arbitration agreement did exist; *and* (2) the party did not participate in the arbitration hearing without raising the objection. Tengasco did participate in the arbitration without raising this objection. Based on the clear language of the statute, Tengasco cannot now complain there was no arbitration agreement and, therefore, the arbitrator "exceeded his authority" by ruling on these issues.

The purpose behind the statute is straightforward. The statute prohibits a party from claiming no arbitration agreement exists without first giving the trial court or the arbitrator an opportunity to decide before arbitration whether an arbitration agreement does in fact exist. In the present case, Tengasco voluntarily submitted all of the claims involving Torch to arbitration without ever objecting to the Trial Court or the arbitrator on the basis that no arbitration agreement existed. Once an unfavorable award was made, Tengasco cannot then claim there was no agreement to arbitrate. Litigants are not allowed to submit issues to arbitration without objecting on the basis that no arbitration agreement exits, and then object if an adverse award is handed down. Such a "lie and wait" attitude would eviscerate the arbitration process. *See Bishof v. Yarbrough Construction Co.*, No. 02A01-9411-CH-00256, 1996 WL 490629 at *8 n.2 (Tenn. Ct. App. Aug. 29, 1996)("T.C.A. § 29-5-313(a)(5) disallows the vacation of an arbitration award on the ground that there was no arbitration agreement when the party seeking the vacation participated in the arbitration hearing without raising objection"). *See also Arnold v. Morgan Keegan & Company, Inc.*, 914 S.W.2d 445, 452 (Tenn. 1996)("[T]he finality and enforceability of an arbitration award is a characteristic of arbitration that distinguishes it from other forms of alternative dispute resolution. Its integrity must not be undermined or compromised, but preserved and enhanced."). Tengasco cannot claim the arbitrator exceeded his powers under Tenn. Code Ann. § 29-5-313(a)(3) when in reality it is claiming there was no agreement to arbitrate, an issue controlled by § 29-5-313(a)(5). To allow Tengasco to have the benefit of the arbitration in which it participated without objection if it is happy with the Arbitrator's award, but to reject the Arbitrator's award if it is unhappy with the award certainly would interfere "with an efficient and economical system of alternative dispute resolution." *D & E Construction Co., Inc.*, 38 S.W.3d at 518. In light of the foregoing, this argument raised by Tengasco is without merit.

The arbitrator specifically found that Torch "acted within the scope of its authority with respect to matters involving Louisiana Safety Systems, Inc. . . . " In ruling on the remaining issues, the Trial Court found that Torch was authorized as Tengasco's agent to direct the location to which the products purchased by LSS were to be delivered. It is undisputed that LSS delivered the products to the location as instructed. Tengasco argues that since *it* never received the purchased goods, payment was never due. Tengasco relies upon Tenn. Code Ann. § 47-2-310(a) which provides that "*[u]nless otherwise agreed*: (a) payment is due at the time and place at which the buyer is to receive the goods …." (emphasis added). In light of the findings of the arbitrator and/or Trial Court that:

(1) Torch was in fact an agent for Tengasco;

(2) the items were delivered by LSS in the manner instructed by Torch; and

(3) Torch was acting within the scope of its authority when directing where the items were to be sent,

it is clear that the parties had "otherwise agreed" and receipt of the goods occurred when they were received by the entity to whom Torch had instructed they be sent. The preponderance of the evidence is not against the Trial Court's findings. This issue also is without merit.

Finally, we address LSS's argument on appeal that the Trial Court erred when it assessed costs against it pertaining to its claim against Torch. LSS's claim against Torch was dismissed, and that judgment has not been appealed. LSS claims that these costs should be taxed to Tengasco, relying on Tenn. Code. Ann. § 20-12-101, which provides that a successful party is entitled to "full costs, unless otherwise directed by law, or by a court of record …." LSS's argument overlooks the fact the taxation of costs was "otherwise directed" by a court of record. It also overlooks Tenn. Code. Ann. § 20-12-119 which provides that the trial court can apportion costs between the litigants as the equities of the case demand. We do not believe that the Trial Court abused its discretion when it concluded that LSS should pay the costs associated with LSS's claim against Torch which ultimately was dismissed.

Conclusion

The judgment of the Trial Court is affirmed. This case is remanded to the Trial Court for further proceedings as may be required, if any, consistent with this Opinion, and for collection of costs below. Costs of appeal are taxed to the Appellant Tengasco, Inc., and its surety.

D. MICHAEL SWINEY